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12  
13 UNITED STATES DISTRICT COURT  
14 FOR THE EASTERN DISTRICT OF CALIFORNIA  
15

16 **California Department of Toxic Substances**  
17 **Control,**

18 Plaintiff,

19 v.

20 **Payless Cleaners, et al.,**

21 Defendants.

Civ. S-02-2389 LKK DAD

**SETTLEMENT AGREEMENT AND  
CONSENT DECREE BETWEEN  
DTSC AND THE CITY OF CHICO**

22 **INTRODUCTION**

23 Plaintiff, the California Department of Toxic Substances Control (“DTSC”), filed a  
24 second amended complaint on December 8, 2004, (the “Complaint”) in the United States  
25 District Court for the Eastern District of California (the “Court”), pursuant to the  
26 Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42  
27 U.S.C. §§ 9601 et seq., and California state law governing the release of hazardous substances,  
28 and nuisance. This Consent Decree embodies the settlement reached between DTSC and

defendant the City of Chico.

The Court, on the motion and with the consent of DTSC and the City of Chico,  
hereby **ORDERS, ADJUDGES, AND DECREES** as follows:

## 1. DEFINITIONS

A. All terms used in this Consent Decree that are defined in section 101 of CERCLA, 42 U.S.C. § 9601, shall have the same meaning set forth in that section.

B. "DTSC," as used in this Consent Decree, shall mean DTSC, its predecessors including, but not limited to, the Toxic Substances Control Program of the State of California Department of Health Services, and its successors.

C. “Southwest Chico Plume” means both the soil and groundwater existing in the shallow, intermediate, and/or lower aquifers underlying the city of Chico south of Big Chico Creek and west of Dayton Road to its intersection with Edgar Slough and thereafter north of Edgar Slough that are contaminated with perchloroethylene and its breakdown products, the area of which is roughly represented by Figure 2 of the “Groundwater Monitoring Report, Third Quarter 2006, Chico Southwest Plume, Chico, California,” dated October 20, 2006 (attached hereto as Exhibit A and incorporated herein by this reference), and all locations where such contaminants may come to be located in the future.

D. "Response Costs," as used in this Consent Decree, shall include all costs of "removal," "remedial action," or "response" (as those terms are defined by section 101 of CERCLA), incurred or to be incurred by DTSC in response to the release or threatened release of hazardous substances at, in, or from the Chico Southwest Plume. Said term shall include, but not be limited to, direct labor costs; contractor, consultant and expert costs; travel and any other out-of-pocket expenses; the costs of identifying, developing evidence against, and pursuing claims against persons or entities liable for the release or threatened release of hazardous substances at, in, or from the Chico Southwest Plume; indirect costs; oversight costs; applicable interest charges; and attorneys' fees.

E. “Remedial Action Plan,” as used in this Consent Decree, shall mean a remedial action plan prepared to address the release or threatened release of hazardous

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1 substances at, in, or from the Chico Southwest Plume and finally approved by DTSC as  
2 described in California Health and Safety Code section 25356.1, and also includes any  
3 amendments to the remedial action plan that are subsequently approved by DTSC.

4 F. "Effective Date" is the day on which this Consent Decree is entered as an  
5 order of the Court.

6 2. **RECITALS**

7 A. DTSC is the California state agency with primary jurisdiction over the  
8 response to the release and threatened release of hazardous substances at, in, or from the Chico  
9 Southwest Plume.

10 B. By and through its Complaint, DTSC seeks to recover jointly and  
11 severally from the City of Chico, and other defendants who are not parties to this Consent  
12 Decree, all costs it has incurred in response to releases and/or threatened releases of hazardous  
13 substances at, in, or from the Chico Southwest Plume, pursuant to section 107(a) of CERCLA.  
14 DTSC also seeks a declaratory judgment that defendants are jointly and severally liable for all  
15 additional costs incurred by DTSC in response to the releases and/or threatened releases of  
16 hazardous substances at, in, or from the Chico Southwest Plume pursuant to section 113(g)(2) of  
17 CERCLA, 42 U.S.C. § 9613(g)(2). DTSC alleges that it will continue to incur Response Costs  
18 until the remedy selected in the Remedial Action Plan, and implementation, operation and  
19 maintenance of that remedy, is completed. DTSC also seeks injunctive relief to abate a public  
20 nuisance (California Health and Safety Code section 58009) and to abate an imminent or  
21 substantial endangerment to public health and safety or to the environment (California Health  
22 and Safety Code section 25358.3).

23 C. By entering into this Consent Decree, the City of Chico makes no  
24 admission of liability.

25 D. Each of the parties to this Consent Decree represents and acknowledges  
26 that, in deciding whether to enter into this Consent Decree, it has not relied on any statement of  
27 fact, statement of opinion, or representation, express or implied, made by any other party to this  
28 Consent Decree. Each of the parties to this Consent Decree has investigated the subject matter

1 of this Consent Decree to the extent necessary to make a rational and informed decision to  
2 execute it, and has had the opportunity to consult independent counsel.

3 E. DTSC and the City of Chico agree that settlement without further  
4 litigation and without the admission or adjudication of any issue of fact or law is the most  
5 appropriate means of resolving this action. This Consent Decree was negotiated and executed  
6 by DTSC and the City of Chico in good faith to avoid prolonged and complicated litigation.  
7 DTSC and the City of Chico, moreover, have negotiated and executed this Consent Decree to  
8 further the public interest and to protect human health and the environment.

9 3. **JURISDICTION**

10 This Court has jurisdiction over DTSC's federal law claims, which arise under  
11 CERCLA, pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613(b). This Court has jurisdiction  
12 over DTSC's state law claims under the supplemental jurisdiction provision of 28 U.S.C.  
13 § 1367(a) and under 28 U.S.C. § 2201, in that the state and federal claims arise from common  
14 facts relating to the release of hazardous substances and remediation of or failure to remediate  
15 the resulting contamination. This Court has personal jurisdiction over each of the parties to this  
16 Consent Decree. Venue is proper in the Eastern District of California pursuant to 28 U.S.C.  
17 § 1391(b) and 42 U.S.C. § 9613(b). This Court, further, has the authority to enter this Consent  
18 Decree as a consent decree of the Court.

19 4. **SETTLEMENT OF DISPUTED CLAIMS**

20 4.1 This Consent Decree represents a fair, reasonable, and equitable  
21 settlement of the matters addressed herein.

22 4.2 For the purposes of this Consent Decree, the City of Chico admits none of  
23 the allegations of the Complaint. Nothing in this Consent Decree shall be construed as an  
24 admission of any issue of law or fact or of any violation of law. Notwithstanding the foregoing,  
25 the City of Chico acknowledges its responsibility pursuant to this Consent Decree to perform  
26 those acts it has agreed to undertake in this Consent Decree, and shall not deny such  
27 responsibility in any proceeding brought by DTSC to enforce this Consent Decree.

28 4.3 Except as set forth in section 10 of this Consent Decree, nothing in this

Consent Decree shall prejudice, waive, or impair any right, remedy or defense that the City of Chico may have in any other or further legal proceeding.

5. **PAYMENTS BY THE CITY OF CHICO**

5.1 Upon the Effective Date, the City of Chico shall be liable to DTSC for a total payment of nine hundred thousand dollars (\$900,000.00). Within thirty (30) calendar days of the Effective Date, the City of Chico shall pay this amount to DTSC as described below in section 5.2.

5.2 Payments described in section 5.1 will be made by check made out to the California Department of Toxic Substances Control and identified with the Court's docket number of this case and "Site No. 100504." Payment shall be mailed to:

Department of Toxic Substances Control  
Cashier, Hazardous Substance Account  
P. O. Box 806  
Sacramento, CA 95812-0806

A copy of the check shall be mailed to:

Jim Tjosvold  
Chief, Northern California Central Cleanup Operations Branch  
Department of Toxic Substances Control  
8800 Cal Center Drive  
Sacramento, CA 95826-3200  
Attn: Donald Mandel, Project Manager for Chico Southwest Plume

Timothy E. Sullivan  
Office of the Attorney General  
P.O. Box 70550  
Oakland, CA 94612

6. **ACCESS TO CITY OF CHICO PROPERTY**

\_\_\_\_\_The City of Chico agrees to allow DTSC, its agents, or contractors reasonable access to public rights-of-way and City of Chico property for the purposes of implementing removal or remedial actions, including the installation of underground pipelines in public streets within the City of Chico and the installation of extraction and monitoring wells. The City of Chico agrees that it will work with DTSC in a cooperative manner to ensure that DTSC's removal and remedial actions can proceed expeditiously with a minimum of procedural delays. Upon receipt by the City of Chico's City Attorney of documentation that the City of Chico, its officers,

1 agents, employees, and servants are included as additional insureds under all insurance  
2 coverages DTSC will require for the work to be performed by DTSC, its agents, or contractors,  
3 the City of Chico will not require DTSC, its agents, or contractors to obtain additional insurance  
4 as a condition of allowing access to public rights-of-way and City of Chico property. The City  
5 of Chico will not require DTSC, its agents, or contractors to post a bond for the purpose of  
6 ensuring proper future destruction of any well that will be owned by DTSC or the State of  
7 California; DTSC acknowledges its responsibility to properly destroy wells that it owns in  
8 accordance with standards promulgated for the destruction of wells by the Department of Health  
9 Services. DTSC, its agents, or contractors will coordinate with the City of Chico in order to  
10 minimize to the extent feasible disruptions to traffic flow and impact on City services. Within  
11 ten (10) days of the Effective Date, the City of Chico will designate an employee to serve as a  
12 liaison with DTSC for coordination of access to public rights-of-way and City of Chico  
13 property.

14 **7. GOVERNMENT LIABILITIES**

15 Neither DTSC nor any other department or agency of the State of California shall be  
16 liable for any injuries or damages to persons or property resulting from acts or omissions by the  
17 City of Chico in carrying out activities pursuant to this Consent Decree. Neither DTSC nor any  
18 other department or agency of the State of California shall be held as a party to any contract  
19 entered into by the City of Chico or its agents in carrying out activities pursuant to this Consent  
20 Decree unless the contract is entered into in writing by DTSC or such other department or  
21 agency of the State of California.

22 **8. COVENANT NOT TO SUE BY DTSC**

23 8.1 Except as specifically provided in sections 8.2 and 9, below, and except  
24 as may be necessary to enforce the terms of this Consent Decree, as of the date this Consent  
25 Decree is entered as a consent decree of the Court, DTSC covenants not to sue the City of Chico  
26 for "Matters Addressed" by this Consent Decree. "Matters Addressed" includes any and all  
27 civil liability for reimbursement of all or any portion of DTSC's Response Costs, past or future,  
28 declaratory relief, injunctive relief or any other relief under CERCLA, the Carpenter-Presley-

1 Tanner Hazardous Substance Account Act, California Health & Safety Code sections 25300 et  
2 seq., or common law for liability for Response Costs and/or response actions, with regard to  
3 releases or threatened releases of perchloroethylene and its breakdown products at, in, or from  
4 the Chico Southwest Plume, as set forth in the Complaint.

5 8.2 "Matters Addressed" shall not include, and the covenant not to sue set  
6 forth in section 8.1 above does not pertain to, any matters other than those expressly specified in  
7 section 8.1. DTSC reserves, and this Consent Decree is without prejudice to, all rights, claims  
8 and causes of action DTSC may have against the City of Chico with respect to all other matters,  
9 including releases or threatened releases of hazardous substances in the city of Chico other than  
10 releases or threatened releases of perchloroethylene and its breakdown products at, in, or from  
11 the Chico Southwest Plume.

12 9. **RESERVATION OF RIGHTS**

13 9.1 The Covenant Not to Sue set forth in section 8.1 above does not pertain to  
14 the following matters, which DTSC reserves, and this Consent Decree is without prejudice to all  
15 rights and claims of DTSC against the City of Chico with respect to the following:

- 16 (a) failure of the City of Chico to meet the requirements of this Consent  
17 Decree;
- 18 (b) damage to natural resources, as defined in section 101(6) of CERCLA, 42  
19 U.S.C. § 9601(6), including all costs incurred by any natural resources  
20 trustees; and
- 21 (c) criminal liability.

22 9.2 Except as expressly provided in this Consent Decree, nothing in this  
23 Consent Decree is intended nor shall it be construed to preclude DTSC from exercising its  
24 authority under any law, statute or regulation. Furthermore, nothing in this Consent Decree is  
25 intended, nor shall it be construed, to preclude any other state agency, department, board or  
26 entity or any federal entity from exercising its authority under any law, statute or regulation.

1           10.     **COVENANT NOT TO SUE BY THE CITY OF CHICO**

2                   10.1    The City of Chico covenants not to sue, and agrees not to assert any  
3 claims or causes of action against, DTSC, or its contractors or employees, for any costs or  
4 damages that the City of Chico might incur or for any injuries or losses that the City of Chico  
5 might suffer as a result of its performance of the requirements of this Consent Decree. The City  
6 of Chico further covenants not to sue, and agrees not to assert any claims or causes of action  
7 against, DTSC, or its contractors or employees, for any and all civil liability for reimbursement  
8 of all or any portion of the City of Chico's response costs, past or future, declaratory relief,  
9 injunctive relief or any other relief under CERCLA, the Carpenter-Presley-Tanner Hazardous  
10 Substance Account Act, California Health & Safety Code sections 25300 et seq., or common  
11 law for liability for response costs and/or response actions, with regard to releases or threatened  
12 releases of perchloroethylene and its breakdown products at, in, or from the Chico Southwest  
13 Plume.

14                   10.2    The City of Chico covenants not to sue, and agrees not to assert any  
15 claims or causes of action against Norville Weiss or Janet Weiss for any costs or damages that  
16 the City of Chico might incur or for any injuries or losses that the City of Chico might suffer as  
17 a result of its performance of the requirements of this Consent Decree. The City of Chico  
18 further covenants not to sue, and agrees not to assert any claims or causes of action against  
19 Norville Weiss or Janet Weiss for any and all civil liability for reimbursement of all or any  
20 portion of the City of Chico's response costs, past or future, declaratory relief, injunctive relief, or  
21 any other relief under CERCLA, the Carpenter-Presley-Tanner Hazardous Substance Account  
22 Act, California Health & Safety Code sections 25300 et seq., or common law for liability for  
23 response costs and/or response actions, with regard to releases or threatened releases of  
24 perchloroethylene and its breakdown products at, in, or from the Chico Southwest Plume.

25           11.     **EFFECT OF CONSENT DECREE**

26                   11.1    This Consent Decree constitutes the resolution of the City of Chico's  
27 liability to DTSC with respect to the Matters Addressed in a judicially approved settlement  
28 within the meaning of section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2). The parties intend



1 that this Consent Decree constitute the resolution of the liability, if any, of the City of Chico, as  
2 alleged joint tortfeasor or co-obligor with any other defendant, for equitable comparative  
3 contribution, or partial or comparative indemnity, based on comparative negligence or  
4 comparative fault as to releases or threatened releases of perchloroethylene and its breakdown  
5 products at, in, or from the Chico Southwest Plume.

6           11.2 Accordingly, upon entry of this Consent Decree as a consent decree of the  
7 Court, and provided that the City of Chico performs all of its obligations under this Consent  
8 Decree, the City of Chico shall be entitled, as of the date this Consent Decree is entered as a  
9 consent decree of the Court, to protection against all claims for contribution, pursuant to section  
10 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for the Matters Addressed by this Consent  
11 Decree (as described in section 8), and by entering this Consent Decree this Court makes a  
12 determination pursuant to California Code of Civil Procedure section 877.6 that the settlement  
13 was made in good faith and shall bar any other joint tortfeasor or co-obligor from any further  
14 claims against the City of Chico for equitable comparative contribution, or partial or  
15 comparative indemnity, based on comparative negligence or comparative fault, to the fullest  
16 extent permitted by law.

17           11.3 Except as specifically provided in this Consent Decree, nothing in this  
18 Consent Decree is intended, nor shall be construed, to waive, release, or otherwise affect any  
19 right, claim, or cause of action held by any party to this Consent Decree against, or to provide a  
20 covenant not to sue to, any third person not a party to this Consent Decree, or to in any way  
21 limit, restrict, or impair the right of any party to this Consent Decree to assert rights, claims,  
22 causes of actions, and defenses against any third person not a party to this Consent Decree,  
23 including without limitation, the right to seek payment, reimbursement, contribution, or  
24 indemnity from such persons for obligations incurred or to be incurred, or actions taken or to be  
25 taken, under this Consent Decree. Except as specifically provided in this Consent Decree,  
26 DTSC and the City of Chico expressly reserve any rights, claims, or causes of actions they  
27 might have against any third person not a party to this Consent Decree.

28           11.4 This Consent Decree is contingent and dependent on all of its terms being

1 approved and entered by the Court. If the Court does not approve and enter this Consent  
2 Decree, DTSC and the City of Chico reserve all of their respective rights, remedies, and  
3 defenses.

4           11.5 This Consent Decree is not intended, nor shall it be construed, to limit or  
5 otherwise affect DTSC's right to select a remedial action for the Chico Southwest Plume.

6           12. **RETENTION OF RECORDS**

7           12.1 The City of Chico shall provide to DTSC, upon request, copies of all  
8 documents and information within its possession or control or that of its contractors or agents  
9 relating to the implementation of this Consent Decree, including, but not limited to design  
10 specifications, reports of construction activities, contracts, invoices, sampling, analysis, chain of  
11 custody records, manifests, trucking logs, receipts, reports, sample traffic routing,  
12 correspondence, easements, permits, grants of access to public property, and city government  
13 resolutions. Such records shall be preserved by the City of Chico until 10 years after the  
14 Effective Date, or 10 years after creation of a record or document, whichever is later.

15           12.2 The City of Chico may assert that certain documents, records, and other  
16 information are privileged under the attorney-client privilege or any other privilege recognized  
17 by law. If the City of Chico asserts such a privilege, it shall provide DTSC with the following:  
18 (1) the title of the document, record, or information; (2) the date of the document, record, or  
19 information; (3) the name and title of the author of the document, record, or information; (4) the  
20 name and title of each addressee and recipient of the document, record, or information; (5) a  
21 description of the subject of the document, record, or information; and (6) the privilege asserted  
22 by the City of Chico. However, no documents, records, or other information created or  
23 generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds  
24 that they are privileged. If a claim of privilege applies only to a portion of a document, the  
25 document shall be provided to DTSC in redacted form to mask the privileged information only.  
26 The City of Chico shall retain all records and documents it claims to be privileged until DTSC  
27 has had a reasonable opportunity to dispute the privilege claim and any such dispute has been  
28 resolved in the City of Chico's favor.

1           13.     **NOTIFICATION**

2                     13.1.   Notification to or communication between the parties to this Consent  
3 Decree as required or provided for in this Consent Decree shall be addressed as follows:

4           As to DTSC:

5                     Jim Tjosvold  
6                     Chief, Northern California Central Cleanup Operations Branch  
7                     Department of Toxic Substances Control  
8                     8800 Cal Center Drive  
9                     Sacramento, CA 95826-3200  
10                    Attn: Donald Mandel, Project Manager for Chico Southwest Plume  
11                    facsimile: (916) 255-3696

12                    Judith Tracy, Esq.  
13                    Office of Legal Counsel  
14                    Department of Toxic Substances Control  
15                    1001 "I" Street  
16                    P.O. Box 806  
17                    Sacramento, CA 95812  
18                    facsimile: (916) 323-5542

19                    Timothy E. Sullivan, Esq.  
20                    Deputy Attorney General  
21                    California Department of Justice  
22                    1515 Clay Street, 20th Floor  
23                    P.O. Box 70550  
24                    Oakland, CA 94612-0550  
25                    facsimile: (510) 622-2270

26           As to the City of Chico:

27                    City Manager  
28                    City of Chico  
29                    411 Main Street  
30                    P.O. Box 3420  
31                    Chico, CA 95927

32                    City Attorney  
33                    City of Chico  
34                    411 Main Street  
35                    P.O. Box 3420  
36                    Chico, CA 95927

37                    Francis M. Goldsberry II  
38                    Goldsberry, Freeman & Guzman, LLP  
39                    777 12<sup>th</sup> Street, Suite 250  
40                    Sacramento, CA 95814

41                     13.2.   Upon 10 days notice to the other party, a party to this Consent Decree  
42 may substitute another person for an addressee named above to receive notifications or

1 communications as required or provided for in this Consent Decree.

2 14. **MODIFICATION OF CONSENT DECREE**

3 This Consent Decree may only be modified upon the written agreement of DTSC  
4 and the City of Chico and the approval of the Court, or upon order of the Court after noticed  
5 motion by a party to this Consent Decree.

6 15. **APPLICATION OF CONSENT DECREE**

7 This Consent Decree shall apply to and be binding upon DTSC, the City of  
8 Chico, and each of their respective successors and assigns. The provisions of this Consent  
9 Decree shall inure to the benefit of DTSC, the City of Chico, and each of their respective  
10 successors and assigns. The provisions of this Consent Decree shall also inure to the benefit of  
11 the employees and agents of the City of Chico, in their capacities as such.

12 16. **AUTHORITY TO ENTER**

13 Each signatory to this Consent Decree certifies that he or she is fully authorized  
14 by the party he or she represents to enter into this Consent Decree, to execute it on behalf of the  
15 party represented, and legally to bind that party.

16 17. **INTEGRATION**

17 This Consent Decree, including the exhibits and other materials incorporated  
18 herein by reference, constitutes the entire agreement between DTSC and the City of Chico and  
19 may not be amended or supplemented except as provided for in this Consent Decree.

20 18. **RETENTION OF JURISDICTION**

21 The Court shall retain jurisdiction of this matter for the purpose of enforcing the  
22 terms of this Consent Decree.

23 19. **EXECUTION OF DECREE**

24 This Consent Decree may be executed in two or more counterparts, each of  
25 which shall be deemed an original, but all of which together shall constitute one and the same  
26 instrument.

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20. **INTERPRETATION**

California law governs the interpretation of this Consent Decree. This Consent Decree shall be deemed to have been drafted equally by all parties hereto.

21. **ATTORNEYS FEES AND COSTS**

As to each other, each party to this Consent Decree shall bear its own costs, attorneys' fees, expert witness fees and all other costs of litigation. This paragraph shall have no effect on the parties' right to recover these fees or costs from any other party.

22. **APPROVALS OF PARTIES**

Plaintiff DTSC consents to this Consent Decree by its authorized representative as follows:

CALIFORNIA DEPARTMENT OF  
TOXIC SUBSTANCES CONTROL

Dated: 12/10/07

/s/ James Tjosvold  
James Tjosvold  
Chief, Northern California-Central Cleanup  
Operations Branch  
California Department of Toxic  
Substances Control

City of Chico consents to this Consent Decree by its authorized representative as follows:

CITY OF CHICO

Dated: 12/10/07

/s/ David M. Burkland  
David M. Burkland  
Interim City Manager

1 APPROVED AS TO FORM:

2 Dated: 12/7/07

3 EDMUND G. BROWN JR.  
4 Attorney General of the State of California  
5 JANET GAARD  
6 Acting Chief Assistant Attorney General  
7 THEODORA BERGER  
8 Senior Assistant Attorney General  
9 SALLY KNOX  
10 Supervising Deputy Attorney General  
11 CHRISTOPHER CROOK  
12 KIRK McINNIS  
13 Deputies Attorney General

9 By: /s/ Timothy E. Sullivan  
10 TIMOTHY E. SULLIVAN  
11 Deputy Attorney General  
12 Attorneys for Plaintiff California Department  
13 of Toxic Substances Control

12 Dated: 3/5/08


13 By: /s/ Francis M. Goldsberry III  
14 FRANCIS M. GOLDSBERRY II  
15 FRANCIS M. GOLDSBERRY III  
16 Goldsberry, Freeman & Guzman, LLP  
17 Attorneys for City of Chico, California

16 Dated: 12/10/07

17 By: /s/ Lori J. Barker  
18 LORI J. BARKER  
19 City Attorney  
20 City of Chico

20 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

21 Dated: April 8, 2008.

22  
23   
24 LAWRENCE K. KARLTON  
25 SENIOR JUDGE  
26 UNITED STATES DISTRICT COURT  
27  
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# **EXHIBIT A**

